

Professionalism and the Hidden Assault on the Adversarial Process

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I. INTRODUCTION

"Professionalism," according to the Report of the American Bar Association's Commission on Professionalism, "is an elastic concept the meaning and application of which are hard to pin down."¹ The organized bar has equated the term with "the spirit of public service,"² "training in

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¹ ABA COMMISSION ON PROFESSIONALISM, . . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM III (1986).

² *Id.* at IV(B)(5); *see also* ABA LAWYER'S CREED OF PROFESSIONALISM D(1) (1988) (approved by the House of Delegates, the creed states, in part, that "[M]y responsibilities as a lawyer include a devotion to the public good.").

Professional Responsibility,"³ and "promoting Justice, Fairness, and Morality,"⁴ principles which, in the abstract, are difficult to oppose. The report, of course, fails to mention that the elastic concept has been stretched by the organized bar to include measures which strike at the very heart of the adversarial process.

The adversarial mode of adjudication mandated by the Constitution in our criminal proceedings has come under fire from other directions, as well. The Rehnquist Court continues to produce opinions that tilt the delicate balance of power between the prosecution and defense in favor of the state,⁵ and the tendency of prosecutors and judges to tolerate the perjury of police and other government witnesses exacerbates this imbalance.⁶ In addition, the plea-bargaining process has long ago replaced adversarial trials in the vast majority

³ ABA Task Force on Law Schools and the Profession, *Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC & ADMISSIONS TO THE BAR 135.

⁴ *Id.* at 213 ("[A] lawyer can and should strive to serve the public and to further the interests of justice, fairness, and morality.").

⁵ See, e.g., ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* (1992). Commentators have written extensively on the crime-control model of criminal justice and the corresponding subordination of the due process model. See Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). As Professor Garcia observes:

What the majority of the Supreme Court apparently prefers is not a true adversarial process. Rather, it is a *pseudo*-adversarial system in which one side has a decided advantage. The majority is not interested in discarding or dismembering the facade of the criminal adversarial process. Rather, its objective is to leave the elements of the system in place while ensuring the correct result: the defendant's conviction. The majority has successfully achieved its goals by partially depriving the accused of the means with which to combat the prosecution. Therefore, the system is supposedly intact while the scales are unevenly weighted in favor of the government.

GARCIA, *supra*, at 228.

⁶ According to the late Professor Irving Younger, who served as a federal prosecutor and state court judge:

Every lawyer who practices in the criminal courts knows that police perjury is commonplace. . . . And even if his lies are exposed in the courtroom, the policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven.

Irving Younger, *The Perjury Routine*, 3 CRIM. L. BULL. 551, 551 (1967).

of criminal cases.⁷ These inroads into the adversarial process, however, differ in a key respect from the current assault on the process mounted in the name of professionalism: only the latter is shielded from view and from open debate, thus curtailing the chances of restoring the integrity of our adversarial proceedings.

Part II of this Article outlines the constitutional requirement of adversarial criminal adjudication and exposes the dark underside of the modern concept of professionalism: the attempted social control of women and minorities presently entering the bar in increasing numbers, as well as the subversion of the adversarial process and of the criminal defense lawyer's inherent role in the process. Part III identifies the principal causes of these adverse effects: the organized bar's efforts to subordinate counsel's allegiance to her client in favor of a duty to the system in order to help rehabilitate the poor public image of lawyers and thus preserve the self-regulatory nature of the profession; the further erosion of counsel's client-oriented role by imposing a duty to influence the client to pursue moral objectives; the bar's attempt to mold the professional conduct of the women and minorities new to the profession to reflect the collusive gentility of an earlier, more homogeneous era of the bar; the profession's distrust of criminal defense attorneys and the professionalism campaign's resultant attempt to expand the powers of the trial judge, thus eroding the dominant role of opposing counsel in conducting the adversarial search for truth; the failure of proponents of the current concept of professionalism to recognize the nature and value of adversarial adjudication in legal proceedings; and their failure to distinguish between the effects of their proposed reforms on our criminal and civil proceedings. Finally, to promote the integrity of our criminal trials in the face of modern professionalism's concealed assault on the adversarial process, Part IV summarizes the misconceptions and hidden agendas of which the organized bar's concept of professionalism must be cleansed.

II. PROFESSIONALISM'S HIDDEN ASSAULT ON THE CONSTITUTIONALLY MANDATED ADVERSARIAL PROCESS

In the parlance of the organized bar, few terms are as popular or nebulous as that of "professionalism." In reality, there are numerous concepts of professionalism, each representing a particular set of values, interests, and perceptions. Typically, the various groups and individuals involved in the professionalism movement advocate some combination of these themes. Several

⁷ Sources estimate that approximately 90% of all criminal cases scheduled for trial are ultimately resolved through plea bargaining. *E.g.*, HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 135 n.151 (1993).

common themes include: correcting abuses of the discovery process; adopting a pro bono requirement for practitioners; providing the poor greater access to legal services; and fostering a problem-solving approach to client representation which emphasizes the use of informal, less costly, less adversarial means of dispute resolution rather than a reflexive resort to litigation. Despite their high-minded or innocuous ring, another popular set of themes undermines the adversarial structure of our criminal trials as well as the fairness accorded defendants and their counsel within the criminal justice system and outsiders within the bar itself. These themes include: fostering greater civility among and between lawyers and judges in their professional encounters; instilling in lawyers a greater awareness of their duty to the system and to the public good; counseling clients to adopt a moral course in legal matters; helping effect a moral outcome in the matter; rehabilitating the poor public image of lawyers; and the need to expand trial judges' authority over the manner in which trials are conducted. To promote the various concepts of professionalism, the organized bar has established innumerable programs, codes, and committees.

In retrospect, the assault on the adversarial process is not surprising. For example, despite the constitutional mandate for adversarial criminal proceedings and his oath to uphold the Constitution, former Chief Justice Warren Burger, the individual most responsible for the development of the organized bar's present professionalism movement,⁸ announced in the movement's initial stages that "trials by the adversarial contest must in time go the way of the ancient trial by battle and blood."⁹ Nonetheless, the adversarial mode of adjudication is constitutionally required in our criminal trials.

The authors of the Bill of Rights were wary of the historical abuses of state authority in inquisitorial trials,¹⁰ generally distrustful of unchecked

⁸ As Chief Justice in the mid-1980s, Burger was a frequent critic of lawyer incompetence. See, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

⁹ Warren E. Burger, Speech at the Meeting of the American Bar Association (Feb. 12, 1984), quotation reprinted in DAVID S. SCHRAGER & ELIZABETH FROST, *THE QUOTABLE LAWYER* 7 (1986). As the Preface to the American Lawyer's Code of Conduct states, the Model Rules "embody a core conviction about the lawyer's role that is fundamentally at odds with the American constitutional system." Theodore Koskoff, *Preface* to AMERICAN LAWYER'S CODE OF CONDUCT (1992) (promulgated by the American Trial Lawyers Association (ATLA)).

¹⁰ *Wardius v. Oregon*, 412 U.S. 470, 479 (1973) (Douglas, J., concurring) ("The Fifth Amendment [was] written with the inquisitorial practices of the Star Chamber firmly in mind . . ."); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 427 (1992) ("The restrained power of American judges is rooted in our general distrust of judicial authority which can be traced back to the revolutionary period . . ."). See generally A. ESMEIN, *HISTORY OF CONTINENTAL*

governmental power, and familiar with the adversarial process and the jury system of the common law. Thus, they built into the Fifth and Sixth Amendments procedural rights of criminal defendants which, taken together, form the adversarial mode of adjudication in our criminal proceedings.¹¹ In

CRIMINAL PROCEDURE (John Simpson trans., 1913) (reprinted 1968).

¹¹ WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §1.6(b), at 37 (2d ed. 1992) ("The structuring of an adversary system underlies many of the guarantees of the Bill of Rights, such as the Sixth Amendment rights of the defendant to the assistance of counsel, to confront opposing witnesses, and to compulsory process for obtaining witnesses in his favor.").

The Supreme Court has cited various combinations of the Fifth, Sixth, and Fourteenth Amendment rights as the basis of our adversarial system. See *Nix v. Williams*, 467 U.S. 431, 453 (1984) (adopting the "inevitable discovery" exception to the exclusionary rule in a case involving an involuntary confession, the Court stated, "The Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process . . ."); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal . . ."); *Garner v. United States*, 424 U.S. 648, 655 (1976) (construing the limits of the privilege against self-incrimination, the Court stated that "[T]he fundamental purpose of the Fifth Amendment [is] the preservation of an adversary system of criminal justice."); *Faretta v. California*, 422 U.S. 806 (1975). In establishing the right of criminal defendants to pro se representation, the Court stated:

The Sixth Amendment . . . rights are basic to our adversary system of criminal justice. . . . The rights . . . guarantee that a criminal charge may be answered . . . through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.

Id. at 818; *Herring v. New York*, 422 U.S. 853, 857 (1975) (considering the constitutionality of a New York statute permitting a judge to order counsel to forgo closing arguments in a nonjury trial, the Court asserted, "[T]he adversary factfinding process . . . has been constitutionalized in the Sixth and Fourteenth Amendments.").

See also AMERICAN LAWYER'S CODE OF CONDUCT Preamble (1992) ("The legal system that gives context and meaning to basic American rights is the adversary system."); GEOFFREY HAZARD, ETHICS IN THE PRACTICE OF LAW 122 (1978) ("[T]he Supreme Court has substantially equated adversarial trial with due process . . ."); JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 11.6, at 366 (1986); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 564 (1986) ("[T]he adversary system . . . [is] presently part of the Supreme Court's definition of due process that is assured to litigants by the Fifth and Fourteenth Amendments . . ."); Leonard Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 HARV. C.R.-C.L. L. REV. 48 (1976) ("[I]t is common to equate the adversary system with the idea of due process itself.").

contrast to inquisitorial trials in which the search for truth is almost exclusively the responsibility of a judicial agent of the state,¹² the fact-finding role of the judge in adversarial proceedings is minimized. Under the Sixth Amendment right to trial by jury, an independent panel of the defendant's peers serves as fact-finder.¹³ The balance of the Sixth Amendment procedural guarantees—the defendant's right to effective assistance of counsel,¹⁴ to testify on her own

¹² See *United States v. Nixon*, 418 U.S. 683, 709 (1974) (superseded by statute) (ordering former President Richard Nixon, pursuant to a subpoena duces tecum issued by the Watergate special prosecutor, to produce a number of crucial White House tapes, the Court stated, "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law."); MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* (1986):

The adversarial mode of proceeding . . . unfolds as an engagement of two adversaries before a relatively passive decisionmaker whose principal duty is to reach a verdict. The [inquisitorial] mode is structured as an official inquiry. Under the first system, the two adversaries take charge of most procedural action; under the second, officials perform most activities.

Id. at 3; HAZARD, *supra* note 11, at 120 ("[T]he adversary system is distinctive for the fact that the parties, through their lawyers, investigate the facts, frame the legal issues, and present the evidence to a passive tribunal that then reaches [a] decision."); LAFAVE & ISRAEL, *supra* note 11, at 35 ("The adversary model gives to the parties the responsibility of investigating the facts, interviewing possible witnesses, consulting possible experts, and determining what will or will not be told."); WOLFRAM, *supra* note 11, at 564 ("[In t]he adversary system . . . parties initiate and control the definition of the issues and the presentation of evidence."); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016-17 (1974) (stating that, in our adversarial process, "Counsel for the state and accused play an aggressive role in presenting and examining witnesses and in shaping legal issues. The judge is a relatively neutral participant who assures that rules of evidence are satisfied and that the jury is properly instructed on the law.").

¹³ U.S. CONST. amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."). See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the right to a jury trial into Fourteenth Amendment due process).

¹⁴ U.S. CONST. amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring the states to provide counsel to indigent criminal defendants); *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that the right to effective counsel is a fundamental element of Fourteenth Amendment due process). For the general standards by which counsel's effectiveness is measured, see generally *United States v. Chronic*, 466 U.S. 648 (1984) and *Strickland v. Washington*, 466 U.S. 668 (1984).

behalf,¹⁵ to compel the testimony of others,¹⁶ to confront her accusers,¹⁷ and the derivative right of cross-examination¹⁸—interlock to create a process in which opposing counsel are responsible for conducting the investigation and presenting the evidence.¹⁹ The Fifth Amendment privilege against self-incrimination²⁰ further limits the coercive powers of the state. Reiterating the Framers' suspicion of official power and their belief in the organic link between justice and the adversarial process, the Supreme Court has consistently acknowledged that "the Constitution recognizes an adversary system as the proper method of determining guilt."²¹

¹⁵ *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) ("The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution.").

¹⁶ U.S. CONST. amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ."); see *Washington v. Texas*, 388 U.S. 14 (1967) (applying the accused's right to compulsory process to state court prosecutions through the Due Process Clause of the Fourteenth Amendment).

¹⁷ U.S. CONST. amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."); see *Pointer v. Texas*, 380 U.S. 400 (1965) (superseded by statute) (incorporating the right to confront witnesses into Fourteenth Amendment due process).

¹⁸ *Pointer*, 380 U.S. at 404 (in which the Court stated that it "cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him").

¹⁹ HAZARD, *supra* note 11, at 120 ("[I]n countries of the civil law tradition such as France and Germany . . . the judge determines the law and finds the facts by his own active investigation and inquiries at trial."); LAFAVE & ISRAEL, *supra* note 11, at 36 ("Although the prosecutor and defense counsel are given an opportunity to contribute, particularly at trial, their role is far more limited than the role of counsel in the American process."); G.E.P. Brouwer, *Inquisitorial and Adversary Procedures—A Comparative Analysis*, 55 AUSTRAL. L.J. 219 (1981) ("One of the main points of contrast between the French and common law adversary trial lies in the role of the judge. In France, the emphasis is very much on the judge's duty to arrive at the truth. . . . [I]t is he who carries the main burden of interrogating the accused and witnesses."). See generally JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 124–32 (2d ed. 1985).

²⁰ U.S. CONST. amend. V (providing, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (holding that the privilege against self-incrimination is a fundamental component of Fourteenth Amendment due process).

²¹ *Singer v. United States*, 380 U.S. 24, 36 (1965) (holding that a criminal defendant has no constitutional right to a *nonjury* trial). The Court has even stated that "the Fifth Amendment outlaws" an "inquisitorial system of criminal justice." *Griffin v. California*, 380 U.S. 609, 614 (1965).

"[T]he adversary system," as Professor Laurence Tribe has observed, "has deep roots in America's political and cultural heritage." LAURENCE H. TRIBE, *AMERICAN*

Moreover, the traditional principle—that criminal defense counsel's primary loyalty lies with the defendant rather than with the court, the public, or the quest for justice,²² and that counsel must zealously represent the defendant within the limits of the law—did not develop on its own, detached from the constitutional method of determining guilt, nor did the principle spring originally from our case law or our codes of legal ethics. Instead, the client-centered role of defense counsel is a corollary of the central premise of the adversarial process: truth²³ will most often and most completely emerge from

CONSTITUTIONAL LAW §§ 10-19, at 764 (2d ed. 1988); *see also* HAZARD, *supra* note 11, at 120-21, 123 ("The adversary system has deep roots in the Anglo-American legal tradition. . . . [It] is not only a theory of adjudication but a constituent of our history of political theory. . . . [T]he adversary system stands with freedom of speech and the right of assembly as a pillar of our constitutional system."); WOLFRAM, *supra* note 11, at 565 ("The adversary system in the United States is culture-bound").

²² The prosecutor, on the other hand, is obliged to seek justice rather than convictions *per se*. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1993) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. 1 (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice."); STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

²³ Modern epistemology has doubted the existence of an objective, identifiable truth independent of human perception. "The *myth* of objectivism has dominated Western culture, and in particular Western philosophy, from the Presocratics to the present day. The view that we have access to absolute and unconditional truths about the world is the cornerstone of the Western philosophical tradition." GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 195 (1980) (emphasis added).

Professor Richard Rorty typifies recent critics of the notion of objective truth:

To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations.

Truth cannot be out there—cannot exist independently of the human mind—because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not.

RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 5 (1989); *see also* HAZARD, *supra* note 11, at 122 (1978) ("[T]rials are not quests for truth in a serious objective or empirical sense, and cannot be. This is because truth is unknowable in any objective

the friction between opposing advocates aggressively presenting their strongest positions and closely probing the credibility of their opponent's position.²⁴ Thus, the modification of the traditional partisan role of criminal defense counsel would undermine the adversarial search for truth constitutionalized by the Fifth, Sixth, and Fourteenth Amendments.

The elastic concept of professionalism, on the other hand, has been expanded to include principles and measures which, while seemingly noble, would alter both the basic structure of the adversarial mode of adjudication in our criminal proceedings and the traditional client-oriented role of criminal defense counsel. According to the ABA Commission on Professionalism, for example, "[t]he Bar should place increasing emphasis on the role of lawyers as officers of the court."²⁵ Or, as a federal court of appeals judge stressed to law students in a Law Day address: judges and attorneys "must continue to be a team. . . . [A]ll of us owe our highest loyalty to the system."²⁶ Or, as a state

sense . . . and decision necessarily involves important elements of intuition, predisposition, and bias.""). Others have warned that:

the idea that there is absolute objective truth is not only mistaken but socially and politically dangerous. . . . In a culture where the myth of objectivism is very much alive and truth is always absolute truth, the people who get to impose their metaphors on the culture get to define what we consider to be . . . absolutely and objectively true.

LAKOFF & JOHNSON, *supra*, at 159-60.

²⁴ See *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (holding that, for purposes of a civil rights action, a public defender does not act under color of state law in representing indigents, the Court stated that "The [criminal justice] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness."); *Herring v. New York*, 422 U.S. 853, 862 (1975) (holding that a state statute permitting a trial judge to prohibit closing arguments in a nonjury trial violated the Sixth Amendment right to counsel, the Court noted that, "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."); see also Martin P. Golding, *On the Adversary System and Justice*, in *PHILOSOPHICAL LAW* 98, 106 (R. Brunaugh ed. 1978) ("[A]n adversarial trial promotes decisions that are well grounded on both the law and the facts because each side will, with partisan zeal, bring to the court's attention all the material favorable to that side, and, therefore, no relevant consideration will escape its notice."); Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975), quoted in *United States v. Chronic*, 466 U.S. 648, 655 (1984) ("Truth," as Lord Eldon, the Lord Chancellor of England from 1801-27, put it, "is best discovered by powerful statements on both sides of the question."). But cf. Judith Resnick, *The Declining Faith in the Adversary System*, 13 *LITIG.* 3, 4 (1986).

²⁵ ABA COMMISSION ON PROFESSIONALISM, *supra* note 1, at IV(B)(5).

²⁶ Peter L. Fay, Law Day Address 5 (Apr. 15, 1986) (transcript on file with author).

judge proposes in an ABA publication, counsel's "first duty [should be] to the law and to the court. The second duty would be to make a diligent effort to discover the truth. The third and last loyalty would be to the client."²⁷ Counsel would become less the champion of the accused in the classic tradition of Lord Brougham²⁸ and more a guardian of the existing social order, thus tilting the

²⁷ Rudolph J. Gerber, *Victory or Truth?*, 16 LITIG. 3, 56 (1990). As an organizer of a bar panel discussion on professionalism cautions in a national legal periodical, "[W]hether zealous advocacy positions should be pursued, despite their negative impact on the system, must be debated with the client." Richard Salomon, *Professionalism: Should There Be Limits on Lawyer Zeal?*, NAT'L L.J., July 21, 1986, at 21.

²⁸ One of the best known formulations of this view is Lord Brougham's, asserted in 1821 as he defended Queen Caroline in a dramatic divorce trial that shook England and threatened to end the reign of King George IV. Peering directly into George's eyes, Brougham declared:

[A]n advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world—that client and no other. . . . Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection.

LORD BROUGHAM, TRIAL OF QUEEN CAROLINE 8 (1821), *as recounted in* LORD MACMILLAN, LAW AND OTHER THINGS 195 (1937). Lord Brougham presented his view of the advocate's role to the House of Lords in the course of his defense of Queen Caroline. King George IV, who was seeking a divorce from Caroline, had secretly married a Roman Catholic prior to his accession to the throne, an act which, if disclosed by Brougham, would probably have cost George the crown. Brougham's description of the lawyer's duty to his client, which has since become a classic formulation, therefore served as a warning to George and the Lords of the disastrous consequences of pursuing the divorce. WILLIAM FORSYTHE, HORTENSIVS 389 n.1 (3d ed. London, J. Murray 1879).

In modern times, former Supreme Court Justice Byron White offered another well-known formulation of the role of criminal defense counsel:

If [defense counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or what he knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying.

United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., concurring in part and dissenting in part).

delicate adversarial balance of power between the prosecution and defense in favor of the state. Those who would realign counsel's duties in this fashion, however, fail to realize that, by fulfilling the lawyer's true role in the adversarial system of justice required by the Constitution, counsel would simultaneously serve the system and, in theory, the public good as well.²⁹ While the proponents of professionalism may contemplate whether another mode of adjudication better advances the cause of truth and justice,³⁰ their call for counsel to serve the system presumably refers to the present system.

Another measure espoused under the guise of professionalism would shift partial responsibility for conducting the search for truth at trial from opposing counsel to the trial judge,³¹ thus obliterating perhaps the most crucial

The organized bar traditionally espoused the client-centered model of lawyering as well:

[T]he role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization.

Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

²⁹ See, e.g., the American Lawyer's Code of Conduct drafted by the ATLA as an alternative to the ABA's Model Rules of Professional Conduct:

Recognizing that the American attorney functions in an adversary system, and such a system expresses fundamental American values, helps us to appreciate the emptiness of some clichés of lawyers' ethics. It is said, for example, that the lawyer is an "officer of the court," or an "officer of the legal system." . . . In the context of the adversary system, it is clear that the lawyer for a private party is and should be an officer of a court only in the sense of serving a court as a zealous, partisan advocate of one side of the case before it, and in the sense of having been licensed by a court to play that very role.

AMERICAN LAWYER'S CODE OF CONDUCT Preamble (1992).

³⁰ For an authoritative comparison of our adversarial system of justice and various inquisitorial models that have evolved in civil law countries, see generally DAMASKA, *supra* note 12; Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480 (1975); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978).

³¹ Paraphrasing an observation of the late Professor Lon Fuller, the drafters stated in the commentary to the Model Code:

distinction between adversarial proceedings and the more autocratic inquisitorial process.³² The ABA Commission on Professionalism, for example, formally proposes that “[t]rial judges should take a more active role in the conduct of litigation.”³³ Many commentators and leaders of the bench and bar echo this position, proposing, in the words of one scholar, “to shift authority from lawyers to judges” with respect to “the presentation of evidence, including the questioning of witnesses.”³⁴

III. CAUSES OF THE HIDDEN ASSAULT ON THE ADVERSARIAL PROCESS

Before one might consider whether contemporary professionalism’s erosion of the adversarial process is reversible, the principal causes of the hidden assault on the process must be identified. There are at least five such causes. First, in an effort to rehabilitate the poor public image of lawyers and to avert a public outcry for greater external regulation of the profession, the organized bar, in the name of professionalism, has virtually abandoned the traditional “client-oriented” model of lawyering inherent in the adversarial process in favor of a model in which counsel’s first duty is to the system and the promotion of the public good. Second, other supporters of the movement, including a number of legal scholars, seek to impose the additional duties of reviewing the moral basis of a client’s objectives and persuading the client to adopt a moral course, duties which would further erode the adversarial nature of our system. Third, the willingness of the professionalism campaign to expand the powers of the trial judge erodes the dominant role of opposing

An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-20 (1969).

³² See *supra* note 12 and accompanying text.

³³ ABA COMMISSION ON PROFESSIONALISM, *supra* note 1, at IV(c)(1) (role of trial judges in conduct of litigation). Although never formally adopted by the ABA House of Delegates as official policy, the Commission’s report was “highly influential” among state and local bar associations, many of which produced similar reports or codes of professionalism. STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 473 (1991).

³⁴ Van Kessel, *supra* note 10, at 534–35; see also Gerber, *supra* note 27, at 56 (“[W]e should consider adopting the continental inquisitorial system’s emphasis on cooperation . . . and a more managerial judiciary, with a lesser role for devious ‘zealous’ [lawyers].”).

counsel in conducting the adversarial search for truth and is attributable, in part, to the profession's repudiation of outsiders, including: the largely poor, minority clients of criminal defense attorneys; cultural outsiders within the bar; and criminal defense attorneys themselves. A fourth cause of the assault on the adjudicatory process mandated by the Constitution is the failure of the proponents of professionalism to understand the fundamental nature and utility of adversarial adjudication in legal proceedings, a failure stemming largely from their dearth of experience in the criminal justice system. Finally, the professionalism movement has failed to draw a basic distinction between the constitutionality and impact of reforming our criminal adjudications, on the one hand, and our civil proceedings, on the other.

A. *Professionalism as Public Relations: The Politics of Self-Regulation*

The heritage of Bar associations, like that of all trade organizations, rests initially in self-interest and protectionism rather than any noble spirit of public service.³⁵

One of the strongest interests shared by lawyers is the continued self-regulation of the legal profession.³⁶ Indeed, the Preamble to the ABA's Model Rules of Professional Conduct³⁷ suggests that preserving internal regulation is itself a reason to act ethically: "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."³⁸ From the bar's perspective, one of the greatest threats to self-regulation consists of the popular image of lawyers as greedy and unprincipled³⁹ since that image might produce a public outcry for government

³⁵ Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L.J. 403, 409 (1992).

³⁶ The ABA effectively regulates attorney conduct through the promulgation of the model codes of ethics adopted, with modifications, in nearly every jurisdiction.

³⁷ Since their adoption by the ABA House of Delegates in 1983, the Model Rules have been adopted, with variations, in at least thirty-nine states and the District of Columbia. SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 138 (John S. Dzienkowski ed., 1994).

³⁸ MODEL RULES ON PROFESSIONAL CONDUCT Preamble (1993). "All segments of the Bar should . . . [r]esolve to employ all the organizational resources necessary in order to assure that the legal profession is effectively self-regulating." ABA COMMISSION OF PROFESSIONALISM, *supra* note 1, at IV(d)(7). "I will be mindful of the need to protect the image of the legal profession in the eyes of the public." ABA LAWYER'S CREED OF PROFESSIONALISM D(4) (1988).

³⁹ See Pamela A. Rymer, *High Road, Low Road: Legal Profession at the Crossroads*, 25 TRIAL 79, 81 (Oct. 1989) (quoting Will Rogers remark that "I don't think you can make

intervention. As a result, following the lawyer-dominated Watergate scandal twenty years ago, the organized bar developed high-profile programs, a new code of professional conduct,⁴⁰ and even a professional responsibility component of the bar examination,⁴¹ all designed, at least in part, to

a lawyer honest by an act of legislature. You've got to work on his conscience. And his lack of conscience is what makes him a lawyer."). Public disdain for lawyers dates back to the earliest days of the profession and, from biblical passages to cocktail party jokes, no group has been more scorned. *See Luke 11:46* ("Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne."); *see also* Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 379 (1987) ("Question: Why did the research scientist substitute lawyers for rats in his laboratory experiments? Answer: Lawyers breed more rapidly, scientists became less attached to them, and there are some things that rats just won't do.").

Professor Post hypothesizes that public disdain for lawyers stems from the fact that, in espousing causes in which they often do not believe, lawyers painfully remind each of us of our own divided self:

We would like to believe that we are the master of our many roles, rather than the reverse, but the persistent and unsettling example of the lawyer will not let us rest easy in this belief. . . . The lawyer is the public and unavoidable embodiment of the tension we all experience between the desire for an embracing and common community and the urge toward individual independence and self-assertion; between the need for a stable, coherent, and sincerely presented self and the fragmented and disassociated roles we are forced to play in the theater of modern life.

Id. at 389.

Another commentator speculates that the public's failure to recognize the legal profession's need for a process-differentiated ethics is another cause of the poor public image of lawyers:

What is seen as the "decline" of ethics is in part the emergence of multiple ethical systems, attuned to the performance of tasks more intricate and impersonal than those to which the great sweeping principles of traditional ethical codes apply. . . . The present Code of Professional Responsibility, because it is not embedded in an explicit examination of the issues raised by the differences between professional and general ethical codes, seems incomplete; and it leaves untouched one major cause for the public distrust of lawyers *and for lawyers' distrust of themselves*.

Charles Frankel, *Code of Professional Responsibility*, 43 U. CHI. L. REV. 874, 883-84 (1976) (book review) (emphasis added).

⁴⁰ MODEL RULES OF PROFESSIONAL CONDUCT (1993).

⁴¹ Many states require that bar candidates pass the Multi-State Professional Responsibility Exam (MPRE), a standardized multiple-choice exam administered several times a year; many other states incorporate professional responsibility questions into essay

rehabilitate the public image of the bench and bar.

In the last decade, with the public standing of lawyers as low as ever⁴² and an increasing number of government sting operations exposing corruption among lawyers and judges,⁴³ the organized bar has intensified its efforts, under the rubric of professionalism, to engender public confidence in the profession and to preserve its self-regulatory nature.⁴⁴ In the absence of a unified vision or program, the proliferation of bar programs, academic conferences, centers for professionalism, creeds of professionalism, and a variety of other efforts under the catch-all label of professionalism, the movement resembles a large, haphazard public relations campaign.⁴⁵ Bar disciplinary committees confirm this notion by tending to ignore blatant cases of attorney incompetence, indifference, or instability,⁴⁶ while focusing almost exclusively on "act[s] that will lower the bar's profits or bring lawyers into public disrepute."⁴⁷

In the bar's attempt to reshape its public image and to preserve self-

questions on the state portion of the traditional, two-day bar examination; some states do both.

⁴² In a recent Harris Poll rating the "moral and ethical standards" of persons in a number of occupations, lawyers finished second to last with a 25% positive rating. Only members of Congress fared worse, inspiring confidence in 19% of those questioned. Small-business owners, for example, received a 64% rating. Grant Ujifusa, *Who Do We Trust?*, READER'S DIGEST 109 (Jan. 1993).

⁴³ Including the "Operation Greylord" and "Operation Court Broom" trials for judicial corruption in Chicago and Miami, respectively.

⁴⁴ "'Professionalism' is now the accepted allusion to the Bar's ambitious struggle to reverse a troubling decline in the esteem in which lawyers are held . . ." Terrell & Wildman, *supra* note 35, at 403.

⁴⁵ "Among bar circles, . . . [the] common view is that the image of lawyers is suffering and that something needs to be done. Specific suggestions run the gamut of public relations techniques—from op-ed articles and TV appearances to school programs and a new creed of professionalism, suitable for framing." Kenneth Jost, *What Image Do We Deserve?*, 74 A.B.A. J. 47, 51 (Nov. 1988). "[I]n an era characterized by moral diversity and economic competitiveness, it is very difficult to discuss any 'shared professional aspirations.'" Terrell & Wildman, *supra* note 35, at 414.

⁴⁶ F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L. F. 193, 225.

⁴⁷ JETHRO K. LIEBERMAN, *CRISIS AT THE BAR* 204 (1978). In the quintessential example of this tendency, at about the same time that the disciplinary committee of the District of Columbia Bar was anxious to commence proceedings against Professor Monroe Freedman for having exercised his First Amendment rights in arguing that criminal defense counsel may be obliged to elicit testimony from a perjurious defendant, the bar ignored examples of blatant instability such as that of a lawyer who had been discovered several times defecating in the courthouse stairwells. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* viii (1975).

regulation, it has failed to distinguish between two reasons for the widespread perception that lawyers are unprincipled. The first is the financial exploitation of clients by their attorneys and other forms of attorney malpractice. A second reason, however, is the apparent tendency of the public to equate criminal defense lawyers with the unpopular Fourth, Fifth, and Sixth Amendment rights they assert on behalf of their unpopular clients, rights toward which the public exhibits widespread hostility. This viewpoint could be altered, to some extent, by better educating society about the role of adversarial procedural protections in curbing potential official abuses in law enforcement and the trial process, and in securing the rule of law for all members of society. By failing to distinguish between these two reasons for the public resentment of lawyers, however, the bar's rehabilitation of its public image will necessarily require changes in the traditional partisan role of criminal defense counsel which ultimately will imperil the integrity of the adjudicatory process prescribed in the Bill of Rights.

B. *The Moral-Activist Model of Lawyering*

Closely related to the misconception that the constitutional process is the problem, another cause of the subversion of our adversarial proceedings is the objective of many within the professionalism movement to further transform the lawyer's role, imposing on counsel—in addition to a responsibility to the system—the duties of exerting a moral influence with respect to her client's objectives and of advancing the good of the public.⁴⁸ Professor David Luban, one of the leading advocates of the "moral activist" model of lawyering, speaks of "a vision of law practice in which the lawyer who disagrees with the morality or justice of a client's ends . . . tries to influence the client for the better"⁴⁹ and "to steer them in the direction of the public good."⁵⁰ Professor

⁴⁸ The *Lawyer's Creed of Professionalism*, adopted by the ABA's House of Delegates in 1988, asserts that "my responsibilities as a lawyer include a devotion to the public good." ABA LAWYER'S CREED OF PROFESSIONALISM D(1) (1988).

⁴⁹ DAVID LUBAN, *LAWYERS AND JUSTICE* 160 (1988).

⁵⁰ *Id.* at 171. Although criticism of the partisanship model is presently in vogue, it is not a new phenomenon. The author of one of the first treatises on legal ethics in the American system offered the following description of the attorney's role:

When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal, or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest, or to impede the course of justice, by special resorts to ingenuity—to the artifices of eloquence—to appeals to the morbid and fleeting sympathies of weak juries. . . . Persons of atrocious character, who have violated the laws of God and man,

Michael Swygert refers to "good moral counsel" as a fundamental obligation of lawyering and asserts that fulfillment of the duty "involves raising and discussing with the client moral issues and the moral ramifications of alternatives."⁵¹ In a third example, the ABA's widely circulated MacCrate Report, *Legal Education and Professional Development*, asserts that "when . . . some of the options available for solving a client's problem would result in unfairness or injustice to others, the lawyer should counsel the client to act in a manner 'that is morally just.'"⁵² The moral-activist model, however, rests upon several myths.

1. *The Myth of Moral Neutrality*

Proponents of the moral-activist model criticize rigorous partisan representation as an abdication of moral responsibility for counsels' acts.⁵³

are entitled to no such special exertions from any member of our pure and honourable professions

DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 755-56 (Arno Press ed. 1972) (2d ed. 1836). As Dean Sharswood described counsel's role: "It is in some measure the duty of counsel to be the keeper of the conscience of the client" GEORGE SHARSWOOD, *PROFESSIONAL ETHICS* 110 (Philadelphia, T. & J.W. Johnson & Co. 1896).

⁵¹ Michael I. Swygert, *Striving to Make Great Lawyers—Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. REV. 803, 814 (1989). Other scholars have echoed this view. Even Monroe Freedman, for example, shares common ground with moral activists: "[C]ounseling with regard to moral as well as legal responsibilities . . . is an essential element of the lawyer's responsibility." Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 EMORY L.J. 467, 472 (1992).

⁵² ABA Task Force on Law Schools and the Profession, *supra* note 3, at 214. Known as the MacCrate Report after the chair of the Task Force that authored the study, the ABA has recently provided a copy to all legal educators and first-year law students.

The ATLA, in the Preface to its alternative model code, The American Lawyer's Code of Conduct, criticized the drafters of the ABA's Model Rules of Professional Conduct for their non-adversarial view of the lawyer's role: "The Kutak Commission sees lawyers as ombudsmen, who serve the system as much as they serve clients." Koskoff, *supra* note 9.

⁵³ See, e.g., Joseph Allegritti, *Christ and the Code: The Dilemma of the Christian Attorney*, 34 CATH. LAW. 131, 132 (1991) (stating that the traditional, client-oriented lawyer believes that counsel is not "morally responsible for the means employed, or the ends achieved" simply as long as no law or rule of ethics has been violated, and that this belief serves to "insulate the attorney from moral scrutiny for his or her professional actions"); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 6, 9 (1975) (asserting that the traditional partisan counsel is an "amoral technician" evading "difficult moral dilemmas").

While the heirs to Lord Brougham's view of the lawyer's role⁵⁴ must recoil from the thought of inflicting an unsolicited moral critique upon the accused, it does not stand to reason that partisan counsel has failed to exercise moral judgment or denied moral responsibility for the consequences of her actions.⁵⁵ Indeed, a criminal defense attorney's decision to work within our criminal justice system implies a fundamental value judgment about the system itself, a commitment to the principles underlying the system, and an acceptance of responsibility for the consequences of counsel's acts. Ultimately, the difference in this respect between client-oriented and moral-activist lawyers is not the adoption or failure to adopt moral principles or to acknowledge responsibility for one's actions. Instead, it is a difference over which principles, which system, and which lawyer's role will optimize the quest for justice. In other words, since the adversarial system represents our society's belief in the propriety of protecting individual liberties when they unavoidably conflict with the maximization of social order, then simply because a criminal defense counsel's zealous advocacy may result in the acquittal of a guilty party and in that party's further victimization of innocent citizens, counsel's actions cannot fairly be characterized as amoral or immoral. Instead, such actions represent the calculated cost, albeit a substantial one, of preserving the constitutional liberties of all citizens.

2. *The Myth of Moral Consensus*

In addition to undermining the adversarial process, the moral-activist model speciously presumes that, within our culturally diverse society, a high degree of consensus on the application of moral principles—or the principles themselves—exists among lawyers and among society members.⁵⁶ While the values of lawyers bore a closer resemblance when the bar was more

⁵⁴ See *supra* note 28 and accompanying text.

⁵⁵ This debate has taken place over the history of the adversarial process: "[E]ven though we admit that the advocate is ready to undertake either side of a cause for hire, it does not thereby follow that he is venal nor that his attitude contravenes the principles of a sound morality." GEORGE WARVELLE, *ESSAYS IN LEGAL ETHICS* 27 (1980) (originally published in 1902).

⁵⁶ See, e.g., Swygert, *supra* note 51, at 809 ("[A] normative morality of higher principles includes reasoned beliefs held by most law-trained persons relating to human dignity, human aspiration, procedural fairness, due process, equal treatment, fundamental human rights, and so on.") *Contra*, e.g., Richard A. Matasar, *The Pain of Moral Lawyering*, 75 IOWA L. REV. 975, 986 (1990) ("[W]e cannot lose sight of the fact that not every lawyer shares the same ethical and moral vision and that we are a pluralist profession . . ."); Terrell & Wildman, *supra* note 35, at 407 ("[L]awyring as a profession exists largely *because of* moral ambiguity [within society] . . .").

homogeneous with respect to class and race, the profession's increasingly diverse composition broadens the spectrum of moral thought.⁵⁷ In reality, clients today could expect to receive diametrically opposed moral guidance from attorneys on many or most matters.⁵⁸ As an example, a gay or lesbian client seeking to adopt a child might be advised by one moral-activist attorney that the client's goal is laudable and will help raise public consciousness about gay and lesbian rights. The moral-activist attorney in the office down the hall, however, might urgently advise the same client to renounce his or her immoral lifestyle and, in order to protect society's interest in the traditional family unit, abandon the attempt to adopt. Further, even if a moral consensus did exist, the moral-activist model would fatally conflict both with the fundamental principles of equal access to the courts and with the right to counsel: clients who represent unpopular causes (e.g., hate groups, cults, and left- or right-wing political activists) would be unable to obtain representation.

3. *The Myth of Moral Enlightenment*

The moral-activist model exudes arrogance and a paternalistic condescension; it implies that clients are morally deficient, that attorneys are morally enlightened,⁵⁹ and, that in our constitutional democracy designed to accommodate conflicting value systems, there is an identifiably superior set of moral principles. Among all of the providers of services and goods, lawyers have no special skill or reason for assuming the role of moral guide.⁶⁰ Just as it

⁵⁷ Indeed, feminists have described an alternative, care-based moral reasoning that rejects the traditional rights-oriented approach. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); Beverly Horsburgh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 U. MICH. J.L. REF. 423, 425 n.4, 426 n.5 (1992).

⁵⁸ "[F]or every lawyer whose conscience may be pricked, there is another whose virtue is tickled." Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 16 (1951).

⁵⁹ As bar leaders are fond of remarking when seeking to justify the monopoly they hold as a profession, lawyers are supposed to be better than the common run of men and women. . . . Their character is supposedly investigated and certified. They are subject to sanctions not employable against the lay public.

LIEBERMAN, *supra* note 47, at 35-36.

⁶⁰ The chief business of the lawyer is that of counsel as to legal rights, and the maintenance, through the courts, of such rights. . . . He is not an expert as to moral as distinguished from legal rights. He may know less of these than his client. There is, too, such a difference of opinion as to mere moral rights that, generally, they do not constitute a basis for advice.

would be inappropriate for a drug store clerk to subject the unmarried purchaser of condoms to a lecture on the immorality of premarital sex, it is intrusive for a lawyer to assume the role of the moral conscience of a captive client. The mere fact that an attorney's clients are often confused, distressed, and easily influenced warrants sympathy, human kindness, and self-restraint, not moralistic intermeddling. Often, "moral discourse" lapses into proselytizing, as illustrated by the remarks of Professor Thomas Shaffer, a leading proponent of the moral-activist role:

The object of law office discourse as moral discourse is to serve the goodness of the client. . . . Born-again Christian lawyers whom I know tell their clients about Jesus Christ as Saviour; some of them have told me that they ask clients to pray with them. . . . I, who am a Christian, would say that my hope for my client is that he respond to the redemption which God has accomplished for him. And if that is my hope, then it is my duty, no doubt, to say something about it.⁶¹

4. *The Destruction of Client Trust*

Finally, the moral activist overlooks the social reality of the attorney-client relationship. In addition to their alienation from the white, middle-class world of the criminal defense attorneys who represent them,⁶² most of the

C.A. Kent, *Legal Ethics*, 6 MICH. L. REV. 468, 474 (1908).

⁶¹ Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 247-48 (1979). "To the extent that one determines to conduct his practice as moral conversation [and] his advocacy as moral discourse, . . . it is possible to be a Christian and a lawyer." *Id.* at 252. See also Allegretti, *supra* note 53, at 137-38 ("The Christian attorney is to bring his or her values into the workplace. . . . Lawyering can be . . . an avenue for prophetic ministry.").

⁶² See *infra* part III.C.1.

Minority defendants criticize public defender attorneys because they are white, middle-class professionals who they feel have more in common culturally with the prosecutors (and judges) than they have with the majority of indigent defendants, who are minority, poor, and of a different social and economic class from that of the defense attorney.

CORAMAE R. MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 180 (1993), citing National Minority Advisory Council on Criminal Justice, *The Inequality of Justice* 213 (1980). As a former public defender observed:

[Indigent criminal clients] do not know me from beans; they do not trust anyone who works in the court system; I am white and they are usually black; they are not paying me a dime and since when does that get you anything; even worse, they know

predominantly indigent, disproportionately minority defendants brought before our courts have been subjected previously to the criminal process, usually many times, often having served time in our dehumanizing prison system, and each time having been represented by counsel. While some of their attorneys were hard-working, capable, and forthright, an appallingly large number were indifferent, unprepared, and incompetent.⁶³ Not surprisingly, these defendants—whether guilty or not—are distrustful of counsel, particularly of those appointed by the court.⁶⁴ In fact, in the eyes of many defendants, their attorney is the most despicable member of the cast of characters who have conspired to deprive them of their liberty: of all the figures in the courtroom, only defense counsel pretends to be on their side.⁶⁵ Under the circumstances,

that the people who are paying me are the same people, more or less, who pay the cops and the D.A.'s.

Randy Bellows, *Notes of a Public Defender* (1983), reprinted in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 88 (1988).

⁶³ As one veteran criminal defender observes:

[Many criminal defense attorneys] simply do not care. They do not investigate. They do not file motions. They do not talk to their clients. They do not think through a defense, prepare an opening statement, subpoena witnesses, or do any of the other myriad tasks necessary to adequate representation. Sometimes, on the day of trial, they cannot even recognize their clients. For a prosecutor, trying a case against one of these lawyers is like shooting fish in a barrel.

Bellows, *supra* note 62, at 66.

⁶⁴ See Bellows, *supra* note 62, at 89; JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE* 105 (1972) (describing a study in Connecticut in which clients of privately retained counsel reported being satisfied with their attorney's performance five times more frequently than clients of public defenders and court-appointed counsel).

⁶⁵ As Professor Amsterdam observes:

It is not easy for a lawyer to convince a client to trust him or her when the client has never seen the lawyer before and particularly when the lawyer is of a different race or social background from the client's. As far as the client is concerned, the lawyer is "the law," along with the police and the judge; the client has no reason to believe that the lawyer is on the *client's* side. S/he will likely distrust the lawyer even more if the client is indigent and the lawyer is court-appointed, since, in common experience, things one gets for nothing are ordinarily worth nothing; and the only way to obtain services one can count on is to buy them.

1 ANTHONY G. AMSTERDAM, *TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES* 108 (1988); see also CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* (1978):

the racist spectacle of a white, middle-class defense attorney acting as a moral missionary to her indigent, minority client is likely to destroy any remaining vestiges of client trust. Lacking such trust, counsel will find herself unable to

For the bulk of defendants—represented by Public Defenders—their attorney is at best [viewed as] a middleman and at worst an enemy agent. Not only is the process of criminal justice . . . an assembly line dedicated to turning over cases . . . , but the defendant's own attorney is thought often to be himself a production worker on the line. He is not 'their' representative, but in league with those who would determine the defendants' fates.

. . . The defendants with whom I spoke tended to see their [court-appointed] lawyers as representing the legal system to them, rather than representing them to the system. "He's not my lawyer, he's the Legal Aid," New York City defendants often respond when judges . . . go through the ritual of asking the defendant whether the individual standing alongside him is his attorney.

Id. at 305; CASPER, *supra* note 64, at 110 (quoting a convict who explains, "They got to be on the state's side in order that they can work for the state."). In a 1980 opinion, the Alaska Supreme Court reprinted a letter from a dissatisfied defendant to his public defender which read, in part:

If I were paying you out of my pocket for your services you would provide more [effective] actions as far as the case is concerned but, since your salary is paid by State taxpayers you can afford to be undependable which is a large part of injustice. I can understand now why such a large percentage of the men in Alaskan jails are there[:] they were represented by Public Defenders. . . . Poor services for poor people

Coleman v. State, 621 P.2d 869, 881 (Alaska 1980), *cert. denied*, 454 U.S. 1090 (1981).

At least four other factors seem to contribute to the greater distrust of court-appointed attorneys, a term used here to encompass both public defenders and private counsel assigned on a case-by-case basis. First, defendants feel that, since court-appointed counsel is paid by the state and "gets his money either way [i.e., win or lose]," he has little incentive to fight hard. CASPER, *supra* note 64, at 110. Second, "paying a lawyer . . . gives the defendant a sense of leverage over his attorney, a sense that he is in a position of some autonomy." *Id.* at 112. Third, while there is evidence that public defenders and privately-retained counsel (but not necessarily court-appointed private counsel) obtain similar outcomes for their clients, public defenders seem to do less in terms of client relations. *See id.* Finally, there is a perception among many defendants that public defenders are less capable attorneys than private counsel. When asked in court whether they are represented by counsel, defendants often respond, "No, I have a public defender." *Id.* at 113.

In reality, however, many public defender offices employ enthusiastic, capable young attorneys who, to the extent their oppressive caseloads and limited investigative resources permit, ably defend their clients. *See, e.g.*, LISA J. MCINTYRE, *THE PUBLIC DEFENDER* (1987).

gather all of the facts from the accused necessary to present an adequate defense.⁶⁶

C. Professionalism and the Subjugation of Outsiders

Occupying positions of power and economic privilege, the leaders of the legal profession possess a vested interest in preserving the socio-economic status quo. By shifting to the trial judge a measure of counsels' control over the search for truth in criminal trials, and by weakening the duty of client loyalty, modern professionalism helps maintain the state's control over an underclass of

⁶⁶ "Whose side are you on, anyway?" is a familiar response to a public defender's request during a pre-trial interview that the defendant elaborate on her version of the facts in light of anticipated testimony by the police.

Although the system's interest in client trust has been subordinated to the largely unwarranted fears underlying the client perjury rules, courts and the organized bar continue to speak in reverent terms of the need for client trust. *See, e.g.,* *Fisher v. United States*, 425 U.S. 391, 403 (1976) ("[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1, 5-2 (1993) state:

A fiduciary relationship exists between lawyer and client. The proper functioning of the legal system requires the preservation by the lawyer of [client] confidences and secrets. . . . [A] client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmts. 4, 9 (1993) state:

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

. . . .

. . . [T]o the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

See also *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960); *Ellis-Foster Co. v. Union Carbide & Carbon Corp.*, 159 F. Supp. 917, 919 (D.N.J. 1958).

poor, disproportionately minority criminal defendants.

1. *Restoring the Collusive Gentility of an Earlier Period of the Bar*

The organized bar has a dark history of utilizing the professionalism movement to exclude or control outsiders who have entered the ranks of the profession itself.⁶⁷ To groups new to the bar, such as women and minorities, and to other nondominant groups within the bar, terms such as professionalism and civility are often understood as code words for an attempt to preserve the gentility and homogeneity of the bar, deadening the impact of demographic diversity on: the culture of practice, the "gentlemanly" limits on adversarial zeal in criminal trials, and the social hierarchy of the bar during a period in which its cultural composition is expanding. Suggestive statements abound in the reports and creeds promulgated in the name of professionalism. The Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit observes, for example, that "the increased size of the bar [is] among the fuels igniting uncivil litigation practices,"⁶⁸ and that lawyers "miss the collegiality, cooperation and respect that may have been present in earlier eras of practice when bars were smaller [and] lawyers knew each other."⁶⁹

Individual advocates of professionalism are often less subtle, attributing unprofessional conduct, for example, to the "belief . . . that entry into the profession should be democratic,"⁷⁰ and proposing, among other "reforms," that law school admission committees consider assessing the moral character of applicants "through such personality tests as the M.M.P.I.⁷¹ or Myers-Briggs,"⁷² despite the culturally skewed nature of such tests.⁷³ In another

⁶⁷ "Regarding their past, Bar associations exhibited all the classic 'negative' features of a closed club." Terrell & Wildman, *supra* note 35, at 410.

⁶⁸ 143 F.R.D. 441, 445.

⁶⁹ 143 F.R.D. 371, 383. Similarly, the chair of the committee has noted that "[s]ome older lawyers look back with nostalgia at their former practice. They remember the collegiality [and] . . . the general honorableness of [the] profession." *Id.* at 375.

⁷⁰ R.J. Gerber, *Victory vs. Truth: The Adversary System and Its Ethics*, 19 ARIZ. ST. L.J. 3, 24 (1987) (The author is presently a judge on the Arizona Court of Appeals.)

⁷¹ The Minnesota Multiphasic Personality Inventory.

⁷² The Meyers-Briggs Type-Indicator. Gerber, *supra* note 70, at 56. A study from the 1960s asserts that "[r]eligious background and national origin . . . [have] an effect on ethical behavior" JEROME E. CARLIN, *LAWYERS' ETHICS* 125 (1966). The author explains that "the source of [a lawyers' degree of] ethical concern may be certain cultural values held and transmitted by groups long established in our society and still committed to the Protestant Ethic with its premium on strict morality" *Id.* at 147. Of greater contemporary concern, however, in his preface to the "important book" containing the study, Professor Geoffrey Hazard—noted legal ethicist, Director of the American Law

example, the former Director of Professional Development for the prestigious Atlanta firm of King & Spalding, who is now a law professor, and the present managing partner at the firm suggest that "a decline in common decency, attitudes, and standards" among lawyers stems, in part, from the increasing "diversity of [the bar's] membership on every dimension: race, religion, gender, and . . . sets of moral values."⁷⁴

Statements such as these recall similar complaints of incivility and prior professionalism campaigns by the organized bar which, like clockwork, have arisen during earlier periods in which the ranks of the bar increased through the admission of cultural outsiders. In the late 1800s, for example, the president of the New York State Bar Association warned about immigrants "in almost all our courts slovenly in dress, uncouth in manners and habits, ignorant even of the English language, jostling, crowding, vulgarizing the profession."⁷⁵ When a new wave of immigrants from Eastern Europe began to gain admission to the bars of several northeastern cities prior to World War I, the profession's old guard again called for more stringent standards of conduct. As the dean of a prominent law school put it, these "shrewd young men, . . . all deeply impressed with the philosophy of getting on, . . . [view] the Code of Ethics with uncomprehending eyes."⁷⁶ In addition, the bar sought to raise law school

Institute, and former Reporter for the Model Rules of Professional Conduct—praised the author for revealing "more than we have ever known before about the ethical climate of the legal profession" *Id.* at xxiii.

⁷³ See, e.g., *State v. Payne*, 791 S.W.2d 10, 17 (Tenn. 1990), *aff'd.*, 501 U.S. 808 (1991).

⁷⁴ Terrell & Wildman, *supra* note 35, at 403, 412. In response, Professor Penegar states:

To conclude from these changes that democracy is the enemy of conformity to ethical standards is preposterous. If lawyers no longer *resemble* each other as much as they once did, or if they *sound* different, or do not exhibit identical social graces, there is no basis in these outward indices of greater heterogeneity even to speculate that attitudes toward or capacities for promoting ethically responsible behavior have changed accordingly. It would reflect the rankest class consciousness to suppose a more demographically diverse legal profession is one that includes more lawyers than a less diverse one who are more likely to lie to courts, cheat their clients, violate confidences or over-reach their adversaries.

Kenneth L. Penegar, *The Professional Project: A Response to Terrell and Wildman*, 41 EMORY L.J. 473, 478 n.13 (1992).

⁷⁵ N.Y. State Bar Assoc., 3 PROC. 67 (1879), as quoted in JEROLD S. AUERBACH, UNEQUAL JUSTICE 51 (1976).

⁷⁶ Harry S. Richards, *Progress in Legal Education*, AALS PROC. 15, 63 (1915). The President of the Carnegie Foundation, for example, referred to the new entrants to the

entrance requirements, effectively eliminating the night law schools attended by immigrants who generally lacked college degrees.⁷⁷ Writing of these periods in *Unequal Justice*, Jerold Auerbach's classic treatment of the social evolution of the American bar, Auerbach observes that, "[a]lthough lawyers spoke the language of professionalism, their vocabulary often masked hostility toward those who threatened the hegemony of Anglo-Saxon Protestant culture. Professionalism and xenophobia were mutually reinforcing."⁷⁸

2. Distrust of Criminal Defense Attorneys

Professionally, criminal defense lawyers are themselves regarded as outsiders by the wider bar. Remarks such as those of a founding partner of a major New York law firm around the turn of the century—"It is a reproach in our profession and in the community for a man practicing law in the city of New York to be regarded as essentially a criminal lawyer"⁷⁹—reveal a prejudice deeply embedded in the psyche of the profession. These sentiments persist today and are manifest in observations similar to that of Judge Marvin Frankel, a prominent critic of the adversarial system, who stated that "the civil litigation bar . . . has seemed more august and respectable" over time than its criminal counterpart.⁸⁰ Modern professionalism's diffusion of the criminal defense attorney's loyalty, and its attenuation of opposing attorneys' responsibility for conducting the search for truth reflect, in part, the legal profession's long-standing distrust and repudiation of criminal defense lawyers.

In particular, the criminal defense bar is suspected of routinely "coaching"

profession as "morally weak." AUERBACH, *supra* note 75, at 107. As one writer has observed of this period, "Until lawyers could discard their myths and memories, their profession would teeter precariously between the world that was lost and the world that was becoming—unable to relinquish one; unable, therefore, to enter the other." *Id.* at 18.

⁷⁷ Former Chief Justice Harlan Stone once referred to this group, consisting largely of Eastern European Jews, as "exhibit[ing] racial tendencies toward study by memorization." Letter from Chief Justice Harlan Stone to Willard Bartlett, February 14, 1913, as quoted in AUERBACH, *supra* note 75, at 107.

⁷⁸ *Id.* at 99.

⁷⁹ Letter from Samuel Untermyer to William Armstrong, December 24, 1909, as quoted in AUERBACH, *supra* note 75, at 26.

⁸⁰ MARVIN FRANKEL, *PARTISAN JUSTICE* 76 (1980). The profession's depth of disdain for those who represent the accused is also evidenced by remarks such as former Chief Justice Warren Burger's acrimonious characterization of the self-image of criminal defense lawyers: "The noble aspects of our conception of criminal justice can be maintained without having every defense counsel envisage himself as a white knight in shining armor out to slay fascist-minded prosecutors and their witnesses." Warren Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 16 (1966).

clients to lie.⁸¹ For example, in a 1989 opinion permitting a trial judge to bar defense counsel from conferring with the accused during brief recesses between direct and cross-examination, even the Supreme Court asserted that "it is simply an empirical predicate . . . that cross-examination of a witness who is uncounseled between direct examination and cross-examination is more likely to lead to the discovery of truth than is cross-examination of a witness who is given time to pause and consult with his attorney."⁸² In his dissent, the late

⁸¹ Probably the best-known example is a scene from the 1959 movie *Anatomy of a Murder*, adapted from the novel of the same title by the late Justice John Voelker of the Michigan Supreme Court (using the pseudonym Robert Traver). Counsel describes the elements of the insanity defense to an attentive murder defendant in an obvious effort to encourage the accused to fabricate his testimony at trial:

[I]t had been obvious to me from merely reading the newspaper the night before that insanity was the best, if not the only, legal defense the man had.

. . . .

"[T]he man who successfully invokes the defense of insanity is taking a calculated risk, like the time you [the defendant] took the chance that the old German lieutenant was alone behind his ruined chimney."

I paused and knocked out my pipe. The Lecture was about over. The rest was up to the student. The Lieutenant looked out the window. . . . Then he looked at me. "Maybe," he said, "maybe I was insane."

. . . .

The Lecture was over; I had told my man the law; and now he had told me things that might possibly invoke the defense of insanity. It had all been done with mirrors. Or rather with padded hammers.

ROBERT TRAVER, *ANATOMY OF A MURDER* 46-47 (1958); see also Bruce A. Green, "The Whole Truth?": How Rules of Evidence Make Lawyers Deceitful, 25 LOY. L.A. L. REV. 699, 704-05 (1992) ("[L]awyers cause witnesses to recall things differently from how they originally perceived them," writes the author. "[B]y molding the personality of their witnesses, lawyers make them more believable than they would ordinarily appear."); Rymer, *supra* note 39, at 80 ("Perhaps the most troubling symptom of all [among today's attorneys] is a win-at-any-cost—indeed, a very high cost—mentality.").

⁸² *Perry v. Leeke*, 488 U.S. 272, 282 (1989). The majority had expressed the same fear earlier in the opinion, stating that "[t]he reason for the rule is . . . to increase the likelihood that [defendants] will confine themselves to truthful statements based on their own recollections." *Id.* at 281-82. In addition, it inadvertently reiterated this notion by suggesting that a trial court could impose a ban which limited communication to nontestimonial matters. *Id.* at 282. Despite its repeated concerns, the majority professed that the ban on communication did not "[rest] on an assumption that trial counsel will engage in unethical 'coaching.'" *Id.* The trial judge in *Perry* conceded that he issued the ban to prevent defense counsel from "curing" the defects in Perry's direct testimony. *State v. Perry*, 299 S.E.2d 324, 327 (S.C.), *cert. denied*, 461 U.S. 908 (1983). The lone dissent to

Justice Thurgood Marshall remarked, "[T]he majority's fears . . . are motivated, at least in part, by an underlying suspicion that defense attorneys will fail to 'respect the difference between assistance and improper influence.'" ⁸³ This mistrust is not a new phenomenon. Commenting over a quarter of a century ago on an earlier case, ⁸⁴ former Justice William Brennan observed, in response to the argument that the liberalization of discovery rules in criminal prosecutions would encourage perjury, "[I]sn't there a suggestion in the argument, and a rather slanderous one, that the criminal defense bar cannot be trusted?" ⁸⁵

The suspicion of rampant coaching is, however, greatly exaggerated. As the Fourth Circuit Court of Appeals observed in a case involving several brief recesses during the testimony of criminal co-defendants, the fear that criminal defense counsel will coach her client to lie "rests upon more cynicism than is justified by the performance of the bar. . . . We think the probability of improper counseling, i.e., to lie or evade or distort the truth, is negligible in most cases." ⁸⁶ Moreover, the fear may represent, in large part, a tendency to confuse the natural proclivity of interested witnesses to lie with counsel's

the South Carolina Supreme Court's affirmation of the ban cautioned that "[t]o allow defendants to be deprived of counsel during court-ordered recesses is to assume the worst of our system of criminal justice, i.e., that defense lawyers will urge their clients to lie under oath." *Id.* at 328 (Ness, J., dissenting).

⁸³ *Perry*, 488 U.S. at 292 n.5 (Marshall, J., dissenting) (paraphrasing, in part, *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976)).

⁸⁴ *State v. Tune*, 98 A.2d 881 (N.J.1953) (announcing a rule that was effectively overturned five years later in *State v. Johnson*, 145 A.2d 313 (N.J. 1958)).

⁸⁵ William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 291. Justice Brennan explained:

After all, isn't it the defense attorney and not the accused himself who will have access to the state's materials? Whatever justification there may be for the assumption that the desperate accused will try anything to escape his fate, the notion that his lawyer can't wait to conspire with him to that end hardly comports with the foundation of trust and ethics which underlies our professional honor system.

Id. at 291-92.

⁸⁶ *United States v. Allen*, 542 F.2d 630, 633 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977); *see also Perry v. Leeke*, 832 F.2d 837, 845 (4th Cir. 1987) (in which the dissent, referring to "the fear that defense attorneys would engage in unethical coaching," stated, "[w]e [refuse] to credit the assumption that many attorneys would flout their ethical obligations.") (Harrison, C.J., dissenting), *aff'd*, 488 U.S. 272 (1989). *But cf., e.g., John S. Applegate, Witness Preparation*, 68 TEX. L. REV. 277 (1989).

traditional duty of zealous representation of the accused.⁸⁷

D. Failure to Appreciate the Need for Adversarial Truth-Finding in Legal Proceedings

Another cause of the professionalism movement's assault on the adversarial system is the failure of leaders of the bench and bar, and of legal scholars, to understand the need for an adversarial search for truth in legal proceedings. Of course, the mere fact that the Framers mandated the adversarial mode of adjudication does not ensure truth and fairness in our criminal proceedings. Judge Marvin Frankel's objection to adversarial truth-finding typifies those of other skeptics:

Our leading religions may teach about loving our neighbors, . . . forbearance, gentleness, and other fond virtues. In our arena for secular justice, however, we enthrone combat as a paramount good. . . . We are taught to presume as a vital premise the belief that "partisan advocacy on both sides," . . . will best assure the discovery of truth in the end. We are not so much as slightly rocked in this assumption by the fact that other seekers after truth have not emulated us. . . . [We] would fear for our lives if physicians, disagreeing about the cause of our chest pains, sought to resolve the issue by our forms of interrogation, badgering, and other forensics. But for the defendant whose life is at stake—and for the public concerned whether the defendant is a homicidal menace—this is thought to be the most perfect form of inquiry.⁸⁸

Criticisms such as Judge Frankel's reveal that the special need for adversarial truth-finding in legal proceedings is not fully understood. His comparison of the truth-finding processes in medicine and law is meaningful only if the obstacles to the discovery of truth in the doctor's office or the scientist's laboratory sufficiently resemble those obstacles present in the courtroom.⁸⁹ In fact, the scientific method of direct inquiry differs in at least three fundamental respects from the jury's pursuit of truth in our adversarial system. First, doctors and scientists seek, through research, observation, and experimentation, to identify the properties of natural phenomena. Unlike the criminal defendant whose past acts are examined by the jury, however, the

⁸⁷ Barbara A. Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 184 (1983–84) ("The root of the perception of lawyers as dishonest is the tradition of unmitigated devotion to the client's interest.").

⁸⁸ FRANKEL, *supra* note 80, at 11–12.

⁸⁹ "[J]ustice is based upon the rule of law grounded in respect for the dignity of the individual" MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1993).

phenomena examined by the doctor or scientist have no claim to the due process protections which, taken together, form the adversarial quest for justice.⁹⁰

Second, while the scientific method of direct inquiry may be most efficient in identifying truths in medicine and science, the more cumbersome adversarial process is designed to meet the unique exigencies of discovering truth in criminal trials. Although a particular fact in nature may be difficult to ascertain, the obstacles to the discovery of scientific truth vary greatly from those in legal disputes: nature, while infinitely complex, has neither a motive to lie nor a memory to fade. If the proper questions are asked when inquiring into the properties of an unknown substance, the answer will be divulged. On the other hand, the answers provided by the petty thieves, overzealous police, and biased witnesses who so frequently take the stand in criminal court vary from day to day, from deposition to trial, and from direct examination to cross. The search for truth in criminal adjudications must, therefore, be especially effective in detecting falsehoods and confabulation.⁹¹ Indeed, by permitting counsel for each side to vigorously probe the claims of opposing witnesses through cross-examination,⁹² the adversarial process utilized in common-law systems is conducive to exposing haziness in recall, careless or innocent inaccuracies, and lies. "Cross-examination," as Dean Wigmore observed, "is beyond any doubt the greatest legal engine ever invented for the discovery of truth."⁹³ In

⁹⁰ See *supra* note 11 and accompanying text.

⁹¹ Confabulation occurs when one innocently "fill[s] in details from the imagination in order to make an answer more coherent and complete . . ." *Rock v. Arkansas*, 483 U.S. 44, 60 (1987). Although, as here, the term is commonly used with respect to any witness, it literally applies to witnesses whose testimony was induced through hypnosis. *Id.*

⁹² 5 JOHN H. WIGMORE, *EVIDENCE* §1367, at 32 (rev. ed. 1974). Although the presiding judge in the modified inquisitorial proceedings of civil law regimes may test the credibility of a witness or the veracity of the witness' testimony, the system lacks the vigorous cross-examination routinely conducted by the opposing side's advocate in adversarial proceedings.

⁹³ *Id.*

For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

. . . If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

addition, the fear of detection and of a possible perjury prosecution presumably deters many would-be perjurers, as does the well-known willingness of trial judges to increase the severity of the sentences of convicted defendants whom the bench suspects of having lied on the witness stand.⁹⁴ Finally, in instructing jurors at the close of trial, the court often issues an explicit warning about the credibility of the accused. Typically, the judge cautions the jury that "[i]n weighing his testimony . . . you may consider the fact that the defendant has an interest in the outcome of this trial."

A third distinction between the search for truth in science and in legal proceedings is that the scientist cannot politically oppress the subject of her proceeding—nature itself. The trial judge, on the other hand, is an agent of the state which can and historically has discriminated against the subject of a criminal proceeding—the accused. By delegating control of the investigation and presentation of evidence to opposing counsel, the adversarial process offers an important degree of protection from the abuse of official power.⁹⁵

In addition to the failure to understand the need for adversarial truth-finding in criminal proceedings, many of the most visible advocates of today's concept of professionalism seem to lack the instinctive feel for our process acquired through years of experience in the criminal justice system. An example of a distressing lack of understanding of both the fundamental due process rights comprising the adversarial process and the mandatory nature of the process appears in the commentary to the Model Rules of Professional

Id.; see also LOUIS NIZER, *MY LIFE IN COURT* 327 (1961) ("If an opponent permits his client to lie . . . [and] if I am prepared and persistent, such a witness cannot survive.").

⁹⁴ See, e.g., Frank E. Schwelb, *From the Bench: Lying in Court*, 15 *LITIG.* 3, 5 (1989) ("[I]f a criminal defendant has been fairly warned that perjury will be costly, and he still lies under oath, this should be a factor in his punishment. As a trial judge, I would give additional time to defendants who had clearly perjured themselves by fabricating defenses . . ."). Defense counsel usually emphasizes this possibility to the accused during the early stages of representation. Generally, counsel also points out that the testimony of defendants is normally viewed with suspicion by the judge or jury and that the prosecutor frequently ferrets out false testimony on cross-examination.

Although enhancing the sentence of the supposedly untruthful defendant seems to constitute the summary punishment of the crime of perjury, it has been declared constitutional. *United States v. Grayson*, 438 U.S. 41 (1978) (in which the Court reasoned that, since the "heinous" crime of perjury reflected poorly upon the possibility of rehabilitation, a trial court may increase the severity of the sentence of a convicted defendant who presented false testimony at trial).

⁹⁵ As Judge Frankel observed disapprovingly, "[T]he central feature [in adversarial proceedings] of control by the parties rather than the public official on the bench, is a corollary of the traditional mistrust of authority." FRANKEL, *supra* note 80, at 50.

Conduct.⁹⁶ The drafters express the fear that, because counsel whose client insists on testifying untruthfully must seek withdrawal, an "unscrupulous defendant" might intentionally trigger a series of mistrials in an effort to avoid prosecution.⁹⁷ Remarkably, despite the obvious unfairness and unconstitutionality of attempting to remove a defendant's right to counsel, the drafters propose that "a second such [attempt] could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation."⁹⁸ That fundamental Sixth Amendment right, as the Supreme Court has made clear, cannot be forfeited or involuntarily "waived."⁹⁹

E. *Professionalism's Failure to Distinguish Between Criminal and Civil Proceedings*

A final cause of the hidden assault on our adversarial criminal proceedings is the general failure of the advocates of modern professionalism to recognize or acknowledge three critical differences between our criminal and civil proceedings with respect to the impact of their proposed reforms. First, although the adversarial structure of our criminal proceedings is mandated by the Constitution,¹⁰⁰ reforms espoused by the proponents of professionalism, which ultimately alter the contours of the adversarial process, typically are not restricted to civil proceedings. Second, the effect of these reforms on our criminal and civil proceedings also varies. For example, while professionalism's emphasis on informal, negotiated dispositions may represent an efficient alternative to adversarial combat for parties to a civil dispute, it

⁹⁶ The ATLA, in the Preface to the alternative American Lawyer's Code of Conduct, described the drafters of the Model Rules as "a commission made up of lawyers who work for institutional clients, in institutional firms, . . . licensed to write prospectuses for giant corporations, or to haggle with federal agencies over regulations and operating rights." Koskoff, *supra* note 9.

⁹⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 11 (1993).

⁹⁸ *Id.* Even some commentators have supported the suggestion. See, e.g., Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 147 (1985).

⁹⁹ See *Farretta v. California*, 422 U.S. 806 (1975); *Johnson v. Zerbst*, 304 U.S. 458 (1938). The Supreme Court has held that "[t]he record must show . . . that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). And, as the Ninth Circuit Court of Appeals has warned, "If in truth the defendant committed perjury . . . she does not by that falsehood forfeit her right to a fair trial." *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978).

¹⁰⁰ See *supra* note 11 and accompanying text.

merely intensifies the pressure exerted on criminal clients to plea bargain away their formal adversarial rights. Finally, one of the most important interests served by adversarial criminal proceedings—the limitation of the potential abuse of state power by restricting the role of the trial judge—is less urgent in civil proceedings because neither party is being prosecuted by the state.¹⁰¹

IV. CONCLUSION: TOWARD ENLIGHTENED PROFESSIONALISM

To promote the integrity of the adversarial process and of the lawyer's role within the process, and to ensure that our criminal proceedings conform more closely to the requirements of the Bill of Rights, will require nothing less than

¹⁰¹ *But cf.* William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707–13 (1993). Professor Simon argues that, among supporters of the client-centered model of the criminal defense counsel's role, the fear of the abuse of state authority is exaggerated:

[T]he image of the lonely individual facing Leviathan is misleading. . . . [R]hetoric tends to suggest that the individual defendant takes on the entire state. But of course, the state has other concerns besides this defendant. . . . It is more plausible to portray the typical defendant as facing a small number of harassed, overworked bureaucrats.

Id. at 1707. By equating state authority in the criminal justice system with “a small number of harassed, overworked bureaucrats,” Professor Simon recognizes only the tip of the iceberg, ignoring the ubiquitous nature of the state in the criminal justice system, including: the authority of the court; the prosecution's strong advantage over the defense in investigatory, scientific, and personnel resources, not to mention the procedural advantages of the prosecution carved out of the adversarial process by the Rehnquist Court; pre-trial detention through bail; and common prosecutorial abuses of power such as politicized indictments and presentments and tolerance of police perjury. *See also* ISAAC D. BALBUS, *THE DIALECTICS OF LEGAL REPRESSION passim* (1977) (Through a painstaking study of the response of local courts to the mass arrests of blacks during urban revolts in Chicago, Detroit, and Los Angeles in the 1960s, Professor Balbus documents the criminal justice system's suspension of due process protections accorded defendants under the Fifth, Sixth, and Fourteenth Amendments.). As Professor Luban observes:

We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained *ex ante*, our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order.

David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1749 (1993).

For a more thorough rebuttal of Professor Simon's reductionist view of state power and its potential abuse, see generally *id.* at 1730–52.

a wholesale cleansing of the organized bar's present concept of professionalism. An enlightened professionalism must be built upon social and jurisprudential reality and must accept that: for better or for worse, the Fifth, Sixth, and Fourteenth Amendments prescribe the component elements of the adversarial process in our criminal proceedings; similar modifications of the adversarial process can produce widely varying effects on our criminal and civil proceedings; two of the present goals of the professionalism movement—subordinating counsel's duty of client loyalty to her duty to the system and shifting a portion of the responsibility for the search for truth from opposing counsel to the trial judge—alter the structure of the criminal process; the moral-activist role of counsel espoused by many supporters of the movement further undermines the client-oriented lawyer's role inherent to the criminal adjudicatory process and, in a pluralistic society, represents a form of moral tyranny; the assault on the criminal process represents, in part, the organized bar's repudiation of criminal defense attorneys and its attempt to shape the professional conduct of the women and minorities presently entering the profession to reflect the collusive gentility of a prior and more homogeneous era of the bar; the profession's exaggerated distrust of the criminal defense bar also reflects a tendency to confuse the mendacity of defendants' testimony with the lawyer's traditional duty of zealous advocacy; and finally, the adversarial mode of seeking truth reflects a healthy independence from the state-dominated process in inquisitorial trials and is uniquely suited to ferreting out the truth as described by contending witnesses. To become worthy of its noble rhetoric of serving justice and the public good, modern professionalism must clear away the debris of its present misconceptions, prejudices, and hidden agendas, and redefine itself as guardian of the uniquely American quest for truth and fairness mandated by the Constitution in our criminal proceedings.